



Comptroller General  
of the United States

Washington, D.C. 20548

*A. Benjamin*

## Decision

**Matter of:** Commercial Energies, Inc.

**File:** B-242261.2

**Date:** March 21, 1991

Gregory Kellam Scott for the protester.  
Gregory Zagorin, Esq., Defense Logistics Agency, for the agency.  
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of apparent solicitation defect--agency's failure to set aside procurement for small disadvantaged business concerns--is dismissed as untimely where it is filed with the General Accounting Office more than 10 working days after the protester received notice of the denial of its agency-level protest.
2. Untimely protest will not be considered under the "good cause" exception to timeliness rules where no compelling reason beyond the protester's control prevented the protester from timely filing its protest with the General Accounting Office.
3. Untimely protest concerning agency's failure to set aside a procurement for small disadvantaged business concerns will not be considered under the "significant issue" exception to the General Accounting Office's timeliness rules where the issue previously has been considered and is not of widespread interest to the procurement community.

### DECISION

Commercial Energies, Inc. protests that request for proposals (RFP) No. DLA600-91-R-0016, issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA), for the supply of natural gas, should have been set aside for small disadvantaged business concerns (SDB).

We dismiss the protest.

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The RFP was issued as a small business set-aside on November 30, 1990, for the supply of natural gas to nine military installations. Proposals were due on January 7, 1991. On December 4, 1990, Commercial protested to the contracting agency that it was required to set aside the RFP for SDBs since there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501 and 219.502-72. By letter dated December 13, DLA denied the protest. On January 4, 1991, Commercial filed the protest in our Office.

Our Bid Protest Regulations require that protests of apparent solicitation improprieties be filed with our Office or the procuring agency prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1990). In a case where an alleged impropriety is timely protested to a contracting agency, any subsequent protest to this Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3). Here, as shown by the certified mail receipt, Commercial received notice of DLA's denial of its protest on December 17, and thus was required to file its protest in our Office no later than January 2, 1991. Since Commercial did not file the protest until January 4, the protest is untimely, even though it was filed prior to the closing date for the receipt of proposals. Sletager, Inc., B-240789.2 et al., Feb. 1, 1991, 91-1 CPD ¶ \_\_\_\_.

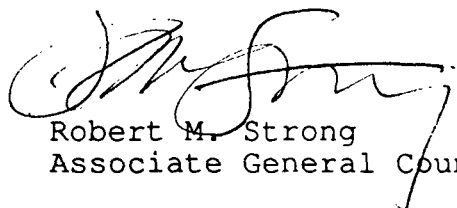
Commercial argues that it did not timely file the protest because another firm that had protested the same solicitation on a different ground informed Commercial that the agency was amending the solicitation and that the amendment also would address Commercial's concerns. Commercial therefore argues that we should consider its untimely protest pursuant to the good cause exception to our timeliness requirements, 4 C.F.R. § 21.2(b). The good cause exception is limited to circumstances where some compelling reason beyond the control of the protester prevents the protester from submitting a timely protest. Oak Ridge Associated Universities--Recon., B-238411.2, May 31, 1990, 90-1 CPD ¶ 513. The fact that a party unrelated to Commercial's protest misinformed Commercial concerning DLA's intentions with respect to the solicitation did not prevent Commercial from contacting DLA to verify the information or to otherwise timely submit its protest to our Office. Accordingly, we will not invoke the good cause exception to consider the protest.

In the alternative, Commercial argues that we should consider the protest pursuant to the significant issue exception to our timeliness rules, also provided by 4 C.F.R. § 21.2(b). The significant issue exception is strictly construed and

sparingly used to prevent the timeliness rules from becoming meaningless. We will invoke it where the protest raises an issue of first impression that would be of widespread interest to the procurement community or where the matter has not been considered on the merits in prior decisions. B & S Transport, Inc., B-240906.2; B-240909.2, Sept. 14, 1990, 90-2 CPD ¶ 216. Commercial argues that the issue is significant since it will arise again in future solicitations for natural gas which DLA intends to issue. Commercial also argues that our Office has never before considered whether DLA properly failed to set aside a procurement for SDB concerns where DLA was aware of available SDBs.

Commercial has not demonstrated that the issue presented in its protest is significant. First, the issue does not become significant simply because DLA intends to issue future solicitations for natural gas. In this regard, each procurement stands on its own as to whether it should be set aside for SDBs under the applicable regulations, see DFARS §§ 219.502-1 and 219.502-72; Kalara Corp.--Recon., B-230562.8, Nov. 2, 1989, 89-2 CPD ¶ 412, and Commercial and other interested parties will have the opportunity to file timely protests in connection with future procurements. See Novitas, Inc.--Second Recon., B-238178.3, May 17, 1990, 90-1 CPD ¶ 483. In addition, we have previously considered whether an agency has properly decided not to set aside a procurement for SDBs, and, in fact, have specifically considered whether DLA properly determined not to set aside natural gas procurements for SDBs. See Commercial Energies, Inc., B-240148, Oct. 19, 1990, 70 Comp. Gen. \_\_\_, 90-2 CPD ¶ 319; Commercial Energies, Inc.--Recon., B-241031.3, Oct. 31, 1990, 90-2 CPD ¶ 355. Finally, while the propriety of the SDB set-aside in this particular procurement is of interest to Commercial individually, we fail to see how it is of widespread interest to the procurement community. See Kalara Corp.--Recon., B-230562.8, supra. Accordingly, we will not consider the protest pursuant to the significant issue exception.

The protest is dismissed.

  
Robert M. Strong  
Associate General Counsel